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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION
12

13 UNITED STATES OF AMERICA,)	No. CR 06-0226 SI
)	
14)	PLEA AGREEMENT
15 Plaintiff,)	
)	
16 v.)	
)	
17 MICHAEL WHALEN,)	
)	
18 Defendant.)	

19
20 I, MICHAEL WHALEN, the United States Attorney's Office for the Northern District of
21 California, and the Fraud Section of the Criminal Division of the United States Department of
22 Justice, (hereafter "the Government") enter into this written plea agreement (the "Agreement")
23 pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure:

24 The Defendant's Promises

25 1. I agree to plead guilty to the sole count in the above-captioned information,
26 charging me with conspiracy to manipulate the price of a commodity in interstate commerce, in
27 violation of 18 U.S.C. § 371. I agree that the elements of the offense and the maximum penalties
28 are as follows:

PLEA AGREEMENT
CR 06-0226 SI

1 Elements:

- 2 (1) Beginning on or about July 1, 2000, and ending on or about November 1, 2000,
3 there was an agreement between two or more persons to manipulate the price of a
4 commodity in interstate commerce in violation of 7 U.S.C. § 13(a)(2); and
5 (2) I became a member of the conspiracy knowing of at least one of its objects and
6 intending to help accomplish it; and
7 (3) One of the members of the conspiracy committed at least one overt act for the
8 purpose of carrying out the conspiracy to manipulate the price of a commodity in
9 interstate commerce.

10 Penalties

- 11 (a) Maximum prison sentence: 5 years
12 (b) Maximum fine: \$ 250,000
13 (C) Maximum supervised release term: 3 years
14 (d) Mandatory special assessment: \$100
15 (e) Restitution: Up to the amount of the loss
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17 2. I agree that I am guilty of the offense to which I will plead guilty, and I agree that
18 the following facts are true:
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20 Background

21 Mirant was an energy company based in Atlanta, Georgia, involved in both power
22 generation and the marketing of energy products. Mirant engaged in the buying and selling of
23 energy-linked commodities including natural gas.

24 Cinergy Corporation ("Cinergy") is an energy company located in Cincinnati, Ohio.
25 Cinergy supplies natural gas and electricity to Ohio, Indiana, and Kentucky. Cinergy has a
26 natural gas trading group that has three primary goals: (1) to ensure physical delivery of natural
27 gas and electricity to customers; (2) to hedge against adverse price fluctuations in the market; and
28

1 (3) to take speculative positions that involve more risk but have the potential to generate higher
2 profits. To achieve these goals, traders work with both physical and financial trades. Physical
3 trades call for the delivery of natural gas to specific locations. In contrast, financial trades
4 generally are entered into without either party to the transaction intending to take delivery of any
5 natural gas. Financial trades can be entered on the New York Mercantile Exchange (called
6 futures contracts) or off-exchange directly between companies (called forward contracts).
7 Financial trades can be used both to speculate and to hedge against price risk in the physical
8 markets. Regardless of the type of transaction, the counter-parties can agree to any price, but
9 often contract prices are tied to published index prices, described below. Both monthly and daily
10 indices are published by a number of different industry newsletters. Monthly indices are
11 published by Inside FERC's Gas Market Report ("Inside FERC"), and other publications, on the
12 first business day each month. Natural gas prices are published for dozens of locations
13 throughout the United States where physical natural gas can be purchased and sold. The
14 publications calculate the monthly index prices using trade data they collect from natural gas
15 traders during the last week of the month. In the natural gas industry, the last week of the month
16 is called "bid week."

17 During 2000, I was a basis trader for Cinergy's natural gas trading. I had previously
18 worked as a gas trader for Mirant. As a basis trader at Cinergy in 2000, I was responsible for
19 buying and selling natural gas products to take advantage of the difference between the price of a
20 physical natural gas contract at a particular location and the price of a standard "Natural Gas"
21 contract traded on the New York Mercantile Exchange. During my employment at Cinergy, both
22 basis and physical traders reported baseload transactions to the index publications, including
23 Inside FERC, that the indices used in calculating index prices.

24 Manipulation of Natural Gas Index Prices

25 I understand and agree that natural gas is a commodity as defined in Title 7, United States
26 Code, Section 1a(4), and that natural gas flows through pipelines that cross state lines, thereby
27 affecting interstate commerce. As a basis trader for Cinergy, I was responsible for reporting
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1 trades negotiated during bid week for locations at which I had placed trades to Inside FERC for
2 its use in calculating the first of month index.

3 Beginning on or about July 1, 2000, and continuing until on or about November 1, 2000, I
4 conspired with others to report through the means of interstate commerce fictitious trades to
5 Inside FERC. By reporting false trades, I intended to influence the price published by Inside
6 FERC at each location for which I reported.

7 When I conspired with others to report fictitious trades to Inside FERC between
8 approximately July 2000 and November 2000, I attempted to skew the published index prices in
9 the direction that would result in a benefit to the positions I had taken on behalf of Cinergy.
10 Specifically, in July 2000, I provided information to Inside FERC about fictitious trades at the
11 Permian Basin and the Houston Ship Channel. Between approximately July 1, 2000 and
12 November 1, 2000, I also conspired with traders at Mirant to list our companies as counter-
13 parties to the reported false trades in order to elude questioning by Inside FERC's editors about
14 the fictitious transactions. Together with traders at Mirant, we agreed on the direction in which
15 we wanted to move the published index price of gas at several trading locations in order to
16 benefit the value and/or profitability of Cinergy's and Mirant's natural gas positions in the
17 market.

18
19 3. I agree to give up all rights that I would have if I chose to proceed to trial,
20 including the rights to a jury trial with the assistance of an attorney; to confront and cross-
21 examine government witnesses; to remain silent or testify; to move to suppress evidence or raise
22 any other Fourth or Fifth Amendment claims; to any further discovery from the government; and
23 to pursue any affirmative defenses and present evidence. I waive any venue defenses that I might
24 have in this case, and I consent to the disposition of the case in the Northern District of
25 California.

26 4. I agree to give up my right to appeal my conviction, the judgment, and orders of
27 the Court. I also agree to waive any right I may have to appeal my sentence. As to any matter in
28 which I am cooperating with the government pursuant to this agreement, I waive any right I may

1 have to assert the attorney-client privilege to decline to answer questions relating to
2 communications with counsel for any other defendant including a defendant acting pro se, except
3 as to communications where counsel for the other defendant was my attorney of record. I also
4 waive my right to conflict-free representation by any attorney or pro se defendant where a
5 conflict arises from that attorney's or defendant's participation in a joint defense agreement to
6 which I also was a party.

7 5. I agree not to file any collateral attack on my conviction or sentence, including a
8 petition under 28 U.S.C. § 2255, at any time in the future after I am sentenced, except for a claim
9 that my constitutional right to the effective assistance of counsel was violated.

10 6. I agree not to ask the Court to withdraw my guilty plea at any time after it is
11 entered, unless the Court declines to accept the sentence agreed to by the parties. I agree that the
12 government may withdraw from this agreement if the Court does not accept the agreed upon
13 sentence set out below. In the event the Court declines to accept the sentence agreed to by the
14 parties and either party withdraws from this agreement, I waive any defense that prosecution is
15 barred by a statute of limitations, if the limitations period has run between the date of this
16 Agreement and the date I am indicted.

17 7. I understand that the Court, while not bound to apply the Guidelines, must consult
18 those Guidelines and take them into account when sentencing. I also agree that the Sentencing
19 Guidelines range will be calculated as follows and that I will not ask for any other adjustment to
20 or reduction in the offense level or for a downward departure from the Guidelines range:
21

22 (1) Base Offense Level, U.S.S.G. § 2F1.1(a): 6

23 [The parties agree that, in light of *ex post facto* issues (see U.S.S.G. §
24 1B1.1(b)(1)), the Court should use the Sentencing Guidelines in effect as of
November 1, 2000.]

25 (2) Loss, U.S.S.G. § 2F1.1(b)(1)(K): +10

26 [The parties agree that the amount of loss the government could prove is
27 \$700,000. This figure is based on an analysis of data gathered from entities who
28 traded at the three locations for which the defendant provided false trading
information during the period of the conspiracy.]

- (3) More than minimal planning, U.S.S.G. § 2F1.1(b)(2)(A): +2
- (4) Mitigating role, U.S.S.G. § 3B1.2: -3
- (5) Acceptance of responsibility: -2
(If I meet the requirements of U.S.S.G. § 3E1.1)
- (6) Adjusted offense level: 13

8. I agree that a reasonable and appropriate disposition of this case, in the event the Government does not move for a departure pursuant to U.S.S.G. § 5K1.1, would be a sentence at the low end of the Federal Sentencing Guidelines range, including a sentence of twelve months' imprisonment, followed by a term of three years supervised release.

9. I agree that I will make a good faith effort to pay any fine, forfeiture or restitution I am ordered to pay. Before or after sentencing, I will, upon request of the Court, the government, or the U.S. Probation Office, provide accurate and complete financial information, submit sworn statements and give depositions under oath concerning my assets and my ability to pay, surrender assets I obtained as a result of my crimes, and release funds and property under my control in order to pay any fine, forfeiture, or restitution. I agree to pay the special assessment at the time of sentencing.

10. I agree to cooperate with the Government before and after I am sentenced. My cooperation will include, but will not be limited to, the following:

- a. I will respond truthfully and completely to any and all questions put to me, whether in interviews, before a grand jury or at any trial or other proceeding;
- b. I will provide all documents and other material asked for by the government;
- c. I will testify truthfully at any grand jury, court or other proceeding as requested by the government;
- d. I will surrender any and all assets acquired or obtained directly or indirectly as a result of my illegal conduct;

1 e. I will request continuances of my sentencing date, as necessary, until my
2 cooperation is completed;

3 f. I will tell the government about any contacts I may have with any co-defendants
4 or subjects of investigation, or their attorneys or individuals employed by their
5 attorney; and

6 g. I will not reveal my cooperation, or any information related to it, to anyone
7 without prior consent of the government.

8 11. I agree that the government's decision whether to file a motion pursuant to
9 U.S.S.G. § 5K1.1, as described in the government promises section below, is based on its sole
10 and exclusive decision of whether I have provided substantial assistance and that decision will be
11 binding on me. I understand that the government's decision whether to file such a motion, or the
12 extent of the departure recommended by any motion, will not depend on whether convictions are
13 obtained in any case. I also understand that the Court will not be bound by any recommendation
14 made by the government.

15 12. I agree not to commit or attempt to commit any crimes before sentence is imposed
16 of before I surrender to serve my sentence; violate the terms of my pretrial release (if any);
17 intentionally provide false information or testimony to the Court, the Probation Office, Pretrial
18 Services, or the government; or fail to comply with any of the other promises I have made in this
19 Agreement. I agree that, if I fail to comply with any promises I have made in the Agreement,
20 then the government will be released from all of its promises, but I will not be released from my
21 guilty plea.

22 13. If I am prosecuted after failing to comply with any promises I made in this
23 Agreement, then (a) I agree that any statements I made to any law enforcement or other
24 government agency or in Court, whether or not made pursuant to the cooperation provisions of
25 this Agreement, may be used in any way; (b) I waive any and all claims under the United States
26 Constitution, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal
27 Rules of Evidence, or any other federal statute or rule, to suppress or restrict the use of my
28 statements, or any leads derived from those statements; and (C) I waive any defense to any

1 prosecution that it is barred by a statute of limitations, if the limitations period has run between
2 the date of this Agreement and the date I am indicted.

3 14. I agree that this Agreement contains all of the promises and agreements between
4 the government and me, and I will not claim otherwise in the future.

5 15. I agree that this Agreement binds the U.S. Attorney's Office for the Northern
6 District of California and the Fraud Section of the Criminal Division of the United States
7 Department of Justice only, and does not bind any other federal, state, or local agency.

8 The Government's Promises
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10 16. The government agrees to move to dismiss any open charges pending against the
11 defendant at the time of sentencing.

12 17. The government agrees not to file or seek any additional charges against the
13 defendant that could be filed as a result of the investigation that led to the pending information.
14 The government may, however, provide the defendant's statements to, or require the defendant to
15 submit to an interview by, any federal or state agency or require him to provide testimony in any
16 federal or state proceeding, as long as his statements may not be used against him. The
17 government may also inform the Court and Probation about the full extent of defendant's
18 criminal activities.

19 18. The government agrees not to use any statements made by the defendant pursuant
20 to this Agreement against him, unless the defendant fails to comply with any promises in this
21 agreement.

22 19. Based on the information now known to it, the government will not oppose a
23 downward adjustment of three levels for acceptance of responsibility under U.S.S.G. § 3E1.1.

24 20. The government agrees that, should it file no motion under U.S.S.G. § 5K1.1, the
25 reasonable and appropriate sentence in this case should be as set forth in paragraph 8 above,
26 unless the defendant violates the Agreement as set forth in paragraph 12 above or fails to accept
27 responsibility.
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21. If, in its sole and exclusive judgment, the government decides that the defendant has cooperated fully and truthfully, provided substantial assistance to law enforcement authorities within the meaning of U.S.S.G. § 5K1.1, and otherwise complied fully with this Agreement, it will file with the Court a motion under § 5K1.1 and/or 18 U.S.C. § 3553 that explains the nature and extent of the defendant's cooperation and recommends a downward departure below the sentence agreed upon by the parties in paragraph 8 above. The government agrees that (1) the defendant's provision of information in debriefings on December 19, 2005 and May 18, 2006, and through presentations by counsel regarding issues including loss amounts and methodologies; and (2) the above promises made by the defendant, together constitute substantial assistance. The government further agrees that barring a recantation or material modification of the above-described information by the defendant, or a violation of the Agreement by the defendant as set forth in paragraph 10 above, the government will file a departure motion under § 3553 and § 5K1.1.

The Defendant's Affirmations

22. I confirm that I have had adequate time to discuss this case, the evidence, and this agreement with my attorney, and that he has provided me with all the legal advice that I requested.

23. I confirm that while I considered signing this Agreement and, at the time I signed it, I was not under the influence of any alcohol, drug, or medicine.

24. I confirm that my decision to enter a guilty plea is made knowing the charges that have been brought against me, any possible defenses, and the benefits and possible detriments of proceeding trial. I also confirm that my decision to plead guilty is made voluntarily, and no one coerced or threatened me to enter into this agreement.

Dated: _____

MICHAEL WHALEN
Defendant

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KEVIN V. RYAN
United States Attorney

Dated: _____

KESLIE STEWART
Assistant United States Attorney

Dated: _____

PAUL E. PELLETIER
Acting Chief, Fraud Section
Criminal Division
United States Department of Justice

ROBERTSON T. PARK
Assistant Chief, Fraud Section

AMANDA L. RIEDEL
Trial Attorney, Fraud Section

I have fully explained to my client all the rights that a criminal defendant has and all the terms of this Agreement. In my opinion, my client understands all the terms of this Agreement and all the rights he is giving up by pleading guilty, and, based on the information now known to me, his decision to plead guilty is knowing and voluntary.

Dated: _____

EDWARD W. SWANSON
Attorney for Defendant